IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

CRL.A.No. 1346 of 2003()

SC.386/2001 of ADDITIONAL SESSIONS COURT (AD HOC - II), THODUPUZHA.

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APPELLANT: ACCUSED

JOY ALIAS JOSEPH, S/O. DEVASSAYA.
KALAKKATTU (H), VAZHATHOPPU KARA,
IDUKKI VILLAGE.

BY ADV. SRI.R.T.PRADEEP

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY ITS
DIRECTOR GENERAL OF PROSECUTION,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTORSRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL. M.P. NO.8208 OF 2003 IN CRL. APPEAL NO. 1346 OF 2003.

DISMISSED

24.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1346 OF 2003

Dated this the 24th day of August, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.386 of 2001 on the file of the Additional Sessions Court (Ad hoc - II), Thodupuzha. The appellant faced trial for the offences punishable under Section 55(a), (b) and (g) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 28.8.1998 at about 5 p.m. the appellant was found distilling arrack in his residential premises at Pakittan and in possession of 5 litres of arrack in a black plastic cannas and two bottles of 750 ml. capacity. To prove the case against the accused, the prosecution examined PWs.1 to 7 and produced Exts.P1 to P11 as well as MOs.1 to 4. On the side of the defence, DW.1 was examined and Exts.D1 to D4 as well as Ext.X1, copy of Assessment Register were produced. On closing the prosecution evidence, the accused was questioned under Section 313 Cr.PC. He denied the allegations levelled against him and stated that he was not residing in the

house from where the contraband articles were alleged to have been seized and that he was arrested by the police from the junction. However, the trial court accepted the prosecution case and found the accused guilty under Section 55(a), (b) and (g) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period one year each and to pay a fine of Rs.1,00,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further period of two months under the above three counts. The sentences were ordered to run concurrently. The appellant was also allowed the benefit under Section 428 Cr.P.C. The above conviction and sentences are challenged in this appeal.

3. Heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant challenges the judgment of the trial court on the following grounds: (i) the trial court ought not to have accepted the evidence of the police officers to find the appellant guilty of the offences charged against him as the independent witnesses examined did not support the prosecution case, (ii) the trial court went wrong in accepting the evidence of PW.1 as he had violated

the provisions of Section 36 of the Abkari Act while conducting search, (iii) the trial court ought to have found that the prosecution had not succeeded in proving the case against the appellant as there was no evidence to show that MO.4 contained any arrack, (iv) the prosecution had not adduced any evidence to prove that the appellant was engaged in distilling arrack in his residential premises and (v) the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not justifiable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**.

5. Before considering the contentions of the learned counsel appearing for the appellant, it is only proper for this Court to consider the evidence of the prosecution witnesses. PW.1 was the Deputy Superintendent of Police attached to the Narcotic Department, Idukki who detected the offence. He stated before the court below that while he and the other police officials were on patrol duty on the direction of the District Superintendent of Police, he got information regarding manufacture of arrack in a shed adjacent to the residential house of the accused and that on getting the information, he prepared a search memo and forwarded it to the court and on reaching the place of occurrence, he

found the accused engaged in distilling arrack. He further stated that he found wash kept in an aluminium vessel of 10 litre capacity and that the said vessel was placed on fire and connected with other utensils. This witness further stated that he found 7 litres of arrack in a can and that he took two samples in two bottles of 180 ml capacity for chemical analysis and sealed the the same in the presence of witnesses. PW.1 also stated that after issuing Ext.P2 arrest memo, he arrested the accused and handed over the accused and the contraband articles seized from his possession to the Sub Inspector of Police, Idukki on preparing Ext.P4 special report. The evidence of this witness is corroborated by PW.2, the Police Officer who had accompanied PW.1 on the date of the incident. The independent witnesses who were present at the time of the alleged occurrence were examined as PWs.3 to 5. These witnesses were declared hostile as they did not support the prosecution case. The Sub Inspector of Police, Idukki Police Station was examined as PW.6. He deposed that the accused was produced before him by PW.1 along with MOs.1 to 6 on the evening of 28.8.1998 and that on the basis of the records handed over to him, he registered the First Information Report against the accused. This witness further stated that he produced the accused before the court on the same day, kept the material objects in his safe custody and sent the requisition to the court to send the samples for chemical analysis. Ext.P11 is the

chemical analysis report which shows that the samples contained 26.15% and 26.93% by volume of ethyl alcohol. PW.7 was the Sub Inspector of Police who took over the investigation and laid the charge sheet.

6. The criticism raised against the evidence of PWs.1 and 2, the official witnesses is that the independent witnesses who were examined as PWs.3 to 5 did not support the prosecution case and hence, the trial court was not justified in accepting their evidence. There is no legal bar in proving the prosecution case on the basis of the evidence of the official witnesses or the investigating officers, provided their evidence is free from doubt. Hence, the contention of the learned counsel in this regard is not sustainable.

7. The next contention is that PW.1 violated the provisions of Section 36 of the Abkari Act and the Kerala Excise Manual while conducting search. As per Section 36 of the Abkari Act, all searches under the provisions of this Act shall be made in accordance with the provisions of the Code of Criminal Procedure, 1973. As per Section 31 of the Abkari Act, abkari and police officers are given the power to conduct search in houses without warrant, if there is reason to believe that the delay that will occur in obtaining a search warrant, as provided under

Section 30 of the Abkari Act, will defeat the very purpose of the search. In such cases, the officer can, after recording his reasons and the grounds of his belief, enter and search any place Further, paragraph 19 of the Kerala Excise Manual, Volume II also provides that when a search has to be conducted without search warrant, the ground or belief should be recorded by the officer before entering the place to be searched. According to the learned counsel appearing for the appellant, PW.1 had conducted the search without preparing the search memo and hence the search would vitiate the seizure and the entire prosecution case. The learned Public Prosecutor brought to the notice of this Court that Ext.P1 was the copy of the search memo produced before the court. In this context, it has to be noted that even though Ext.P1 was marked, subject to the objection raised by the counsel for the defence, the trial court found that the evidence adduced by PWs.1 and 2 would prove that the search was conducted in compliance of the provisions of the Abkari Act and the Kerala Excise Manual. It is seen that there is no evidence forthcoming from the prosecution to prove that the original of Ext.P1 was sent to the court. There is no record to show that such a procedure was followed by PW.1. But, considering the evidence of PWs.1 and 2, it is possible to hold that the infraction of the provisions of Sections 31 and 36 of the Abkari Act and the provisions of the Kerala Excise Manual will not vitiate

the trial as the prosecution has succeeded in proving that search was actually conducted by the investigating officer. In the above circumstances, the contention of the learned counsel that the search is vitiated is not acceptable.

8. Now, with regard to the contentions that the prosecution had not adduced any evidence to prove that the appellant was engaged in distilling arrack in his residential premises and that MO.4 can did not contain arrack, as alleged by the prosecution, it is seen that PW.2 when cross-examined stated that he had not seen the actual manufacture of arrack by the appellant. Further, the nature of the material objects produced before the court also creates some doubt regarding the evidence of PWs.1 and 2. The appearance of the vessels would not prove that those were used for distilling arrack. That apart, though it was the prosecution case that MO.4 can contained 7 litres of arrack, the can was found to be empty. There is also no evidence to show that samples were taken from MO.1 series. The evidence is that samples were taken from MO.4 can. In the above circumstances, this Court is of the view that the prosecution failed to prove that the appellant was in possession of the contraband articles. PWs.1 and 2 had stated that when they entered the shed adjacent to the house of the accused, they saw the accused engaged in the

manufacture of arrack. In Ext.P3 search list it is stated that "ടി അടുപ്പിനുമുകളിൽ ഏകദേശം 10 ലിറ്ററോളം കോട ഒരു വലിയ അലുമിനിയക്കലത്തിൽ നിറച്ചുവച്ചിരിക്കുനനതായും ആയതിന മുകളിൽ മദ്ധ്യഭാഗത്ത ും പള്ളഭാഗത്തും ഓരോ തുളയിട്ട് പള്ളഭാഗത്തെ ത ുളയിൽക്കൂടി ഒര ു ഈറ്റക്ക ുഴൽ കയറ്റിയ നിലയിൽ ഒര ു മൺചട്ടി വച്ചിരിക്കുന്നതായും ടി മൺചട്ടിയ ുടെ മ ുകളിൽ മറ്റൊര ു അല ുമിനിയകലം കയറ്റി വച്ചിരിക്കുന്നതായും കാണ ുന്നു. " It is further stated in Ext.P3 that "കൂടാതെ ഒര ു വെളുത്ത കുപ്പിയിൽ ഉദ്ദേശ ം750 മില്ലി വാറ്റ ുചാരായവും ആകെ 8 1/2 ലിറ്റർ വാറ്റുചാരായം ശേഖരിച്ച് അടപ്പിട്ട് അടച്ച് ഭദ്രമാക്കിയ നിലയിൽ കാണുന്നു. ടി ഷെഡ്ഡിന്റെ ഉടമസ്ഥനായ ക ുളക്കാട്ടുവീട്ടിൽ ജോയി എന്ന് വിളിക്ക ുന്ന ജോസഫ് അടുപ്പുകത്തിച്ച് ചാരായം വാറ്റിയെട ുക്കുന്നനുള്ള ജോലയിൽ വ്യാപ്രതനായിരിക്ക ുന്നതായി കാണപ്പെട്ടു. സ്ഥലത്തുകാണപ്പെട്ട കന്നാസിലെയ ും ക ുപ്പിയിലെയും ചാരായം ര ുചിച്ചും മണത്തും നോക്കിയതിൽ ആയത് വാറ്റുചാരായമാണെന്ന് കാണപ്പെട്ട ു.' "

A reading of the above and the evidence of PWs.1 and 2 would show that at the time of search, the appellant was keeping MOs.1 to 3 and 6. These material objects were used for distilling arrack. The evidence of PWs.1 and 2 would only show that the appellant was attempting to prepare arrack. Hence, the offence under Section 55(b) of the Abkari Act is not proved by the prosecution beyond reasonable doubt.

9. Considering the fact that there was no evidence to prove that the appellant was in possession of arrack and in the light of the decisions of

this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, this Court is of the view that the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not sustainable. In the above two decisions, this Court had categorically held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that the appellant was in possession of the contraband articles in connection with export, import, transport or transit.

10. With regard to the offence under Section 55(g) of the Abkari Act, the evidence of PWs.1 and 2 would show that they had seized MOs.1 to 3 and 6 from the shed adjacent to the house of the appellant. The prosecution case itself was that the shed and house were unnumbered. But, the prosecution succeeded in proving that the appellant was in possession of the shed during the relevant time. The fact that MOs.1 to 3 and 6 were found in the shed belonging to the appellant would show that the appellant was keeping those items for the purpose of manufacturing arrack in large scale. The material objects seized from the appellant were used for the purpose of manufacturing arrack. If so, the finding of the trial court that the appellant committed offence punishable under

Section 55(g) of the Abkari Act is only to be upheld.

11. Accordingly, the finding of the trial court that the appellant committed offences punishable under Section 55(a) and (b) of the Abkari Act is set aside. The finding entered by the trial court that the appellant committed offence punishable under Section 55(g) of the Abkari Act, the conviction entered thereunder and the sentence awarded by the trial court under Section 55(g) of the Abkari Act are confirmed. The appellant is also entitled to the benefit under Section 428 Cr.P.C.

The Crl. Appeal is allowed in part. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

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